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Supreme Court of the United States

OCTOBER TERM—1945

No. 305

TOWNSHIP OF HILLSBOROUGH, SOMERSET COUNTY, N. J., and CHRISTOPHER G. HORNER, Collector of Taxes of the Township of Hillsborough,
Petitioners,

vs.

DORIS DUKE CROMWELL, individually and as Trustee of the Duke Endowment,
Respondent.

BRIEF FOR PETITIONERS

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No. 305

TOWNSHIP OF HILLSBOROUGH, SOMERSET COUNTY, N. J., and CHRISTOPHER G. HORNER, Collector of Taxes of the Township of Hillsborough,

Petitioners,

vs.

DORIS DUKE CROMWELL, individually and as Trustee of the Duke Endowment,

Respondent.

BRIEF FOR PETITIONERS

Jurisdiction

This case comes here on a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit pursuant to the provisions of the United States Code, Title 28, Section 344(b). The petition was filed on the 8th day of August, 1945, and the writ of certiorari granted October 8, 1945.

Opinions Below

The writ seeks the review of the final judgment of the United States Circuit Court of Appeals for the Third Circuit entered on May 9, 1945, affirming a judgment of

the United States District Court for the District of New Jersey, entering a summary judgment in a declaratory judgment action, in favor of the respondent and against the petitioners voiding four tax assessments levied against the respondent in her individual capacity and as Trustee of the Duke Endowment, a common law trust created and existing by virtue of the laws of the State of New Jersey.

The opinion of the Circuit Court of Appeals is reported in 149 Fed. (2d) 617 and at pages 148 to 155 of the Record. The opinion of the United States District Court for the District of New Jersey is reported in 56 F. Sup. 41 and at pages 111a to 113a of the Record.

The United States District Court for the District of New Jersey entered a summary judgment on what it conceived to be the state law, but assumed and retained jurisdiction on the ground of the allegations in the complaint that the plaintiff had been intentionally and systematically discriminated against and that there was not an adequate remedy in the state courts for such discrimination so that the existing state law was in conflict with the federal constitution.

The District Court's opinion on the motion of petitioners' to dismiss the complaint may be found at pages 74a to 80a of the record.

The Circuit Court of Appeals affirmed the judgment of the District Court on the ground that the assessments were void under the state law and that the New Jersey law did not provide an adequate remedy for a taxpayer who was intentionally and systematically discriminated against and that, therefore, the New Jersey law violated the Equal Protection Clause of the Constitution.

Statement of Facts

The proceedings pertinent to this appeal are as follows:

On July 14, 1941, the respondent instituted her action individually and as trustee of the Duke Endowment against the Township of Hillsborough, Christopher G. Horner, Collector of Taxes of the Township of Hillsborough, William Lifgren, W. W. Davenport, Jr. and Angelo R. Soriano, constituting the Somerset County Board of Taxation, and Charles V. N. Davis, Tax Assessor of the Township.

The action was instituted solely and by virtue of the Federal Declaratory Judgment Act. U. S. C. A. Title 28, Sec. 400 (p. 7a to p. 9a). The relief sought was a declaration by the Court that four intangible personal property tax assessments for the years 1940 and 1941 levied by the Somerset County Board of Taxation against the respondent individually and as trustee of the Duke Endowment, a common law trust, be held null and void (p. 35a).

After issue was joined the Trial Court on motion of the respondent entered a summary judgment based on what it conceived to be the state law in favor of the respondent and held that the assessments were null and void. The assumption and retention of jurisdiction by the Court and the entry of judgment and affirmance on appeal results in this appeal (p. 114a to p. 116a).

The complaint alleges that the respondent is a resident of the Territory of Hawaii and that on November 7, 1940, while respondent was at her home in the Territory of Hawaii the defendant Davis, as tax assessor of the Township of Hillsborough, wrote her a letter directed to her at Duke Farms, Hillsborough Township, asking that respondent give a true account of her personal property, money, effects and credits, as of the first day of October, 1940, so that the assessor could fix a proper assessment of

all her personal property taxable in Hillsborough Township.

On December 4, 1940, Freeman J. Daniels, Esq., an attorney representing the respondent, wrote to defendant Davis acknowledging receipt of the letter on her behalf and stating that the respondent was not further taxable in the Township with respect to any personal property because on that date she was not a resident of the State of New Jersey.

It is alleged that prior to October 1, 1940, respondent ceased to be a resident of the Township of Hillsborough and had established her residence in the Territory of Hawaii. It further alleged that an assessment had been made against the respondent individually on account of her personal property for the taxing year 1941.

On June 26, 1941, the said defendants, Lifgren, Davenport and Soriano, sitting as the Somerset County Board of Taxation, adopted a resolution which recited that after due inquiry and examination it determined that the respondent was on October 1, 1939, a resident of Hillsborough Township and that taxable intangible personal property owned by the respondent on October 1, 1939, was entirely omitted by the assessor of Hillsborough Township from the assessment of property of said Township for the taxing year 1940, and in its resolution assessed as omitted property againt the respondent individually for the taxing year 1940 an assessment in the sum of $60,054,424, based upon intangible personal property owned by the respondent on October 1, 1939, the taxing date on which the assessment is made for the year 1940.

The resolution recites that the assessment was entered as a result of the application of the petitioner Horner, a resident and taxpayer and the collector of taxes of the defendant Hillsborough Township, and that his application was supported by proof (p. 37a to p. 39a).

On the same date a similar resolution was adopted by the said Somerset County Board of Taxation entering an assessment against the respondent individually in the same amount for intangible personal property owned by her on October 1, 1940, and which was omitted from the assessment by the assessor of Hillsborough Township for the taxing year 1941 (p. 39a to p. 41a).

On the same date another resolution was adopted by the said Somerset County Board of Taxation against the respondent as trustee of the Duke Endowment assessing a tax against her as trustee of the Duke Endowment for intangible personal property owned by the said Duke Endowment on October 1, 1939, and omitted by the assessor of Hillsborough Township from the assessment of property for the taxing year 1940. The amount of the assessment based upon the personal intangible property owned by said Duke Endowment was in the sum of $161,886,014 (p. 43a to p. 45a).

On the same date another resolution was adopted by the said Somerset County Board of Taxation against the respondent as trustee of the Duke Endowment for the intangible personal property owned by the said Duke Endowment on October 1, 1940, and omitted by the assessor of Hillsborough Township from the assessment of property for the taxing year 1941. The amount of the assessment was the same as in the first resolution against the Duke Endowment (p. 46a to p. 48a).

Certified copies of all the resolutions and schedules annexed thereto were mailed to the respondent at her home in Hillsborough Township on June 27, 1941, and received there. She was advised at that time that the next regular meeting of the Tax Board would be held on July 14, 1941, at 10:30 A.M. at the Court House, Somerville, New Jersey (p. 16a, p. 36a, p. 42a). The respondent did not appear at this meeting but instituted the declaratory judgment action on that day.

It is alleged that the taxes assessed against the respondent individually were invalid because prior to October 1, 1940, she was not a resident of the Township of Hillsborough; that the Somerset County Board of Taxation did not have any power or jurisdiction to make the assessment, that the respondent, individually and as trustee, was unjustly, arbitrarily and fraudulently discriminated against in the assessment of taxes and that her constitutional rights had been infringed. She denied that she owned the property assessed individually or as trustee of the Duke Endowment and alleged that she did not receive any notice of the assessment prior to its entry. She avers that the Duke Endowment is a common law trust created by James B. Duke on December 11, 1924, and is devoted to charitable purposes, and that the intangible personal property of the Duke Endowment was in the custody of its treasurer, a resident of the State of New York.

The respondent prayed that the Court by virtue of the Federal Declaratory Judgment Act declare the assessments and resolutions adopted by the Somerset County Board of Taxation be held wholly null and void (p. 7a to p. 35a).

On September 8, 1941, an order was entered by the Court dismissing the suit as to defendants, Lifgren, Davenport and Soriano, constituting the Somerset County Board of Taxation.

The answer filed by the petitioners denied that the respondent was not a resident of the Township of Hillsborough and denied that she had paid any tax for the years 1940 and 1941 on her personal intangible property and denied that the Duke Endowment had paid any tax at any time to Hillsborough Township. The answer also denied that the assessments were entered contrary to law and in violation of the constitutional rights of the respondent and denied all charges of fraud and intentional discrimination.

The answer averred that the Duke Endowment is a common law trust created and existing by virtue of the laws of the State of New Jersey and when created by James B. Duke he was a resident of Hillsborough Township and the situs of all of its personal intangible property was at all times in Hillsborough Township. The answer also avers and alleges that the taxes were assessed in accordance with the Statutes of the State of New Jersey and that legal notice was given to the respondent of the date of the meeting following the enactment of the resolutions at which time she had an opportunity to be heard in respect to the assessments. It further alleges that the respondent individually and as trustee had concealed the assets which were taxable and had refused to give any information relative thereto.

The answer specifically challenged the jurisdiction of the Court on the ground that the suit was not within the Federal Declaratory Judgment Act, that it was in effect the enjoining of the collection of a state tax and that the plaintiff had a plain, speedy, efficient and complete remedy in the administrative bodies and courts of the State of New Jersey (p. 50a to p. 70a).

On November 3, 1941, petitioners and the remaining defendant moved to dismiss the complaint on the ground that the Court was without jurisdiction under the Federal Declaratory Judgment Act, that the respondent had a speedy, adequate and efficient remedy in the administrative bodies and courts of the State of New Jersey, that the purpose of the action was in effect to enjoin, suspend or restrain the assessment, levy or collection of a tax imposed by the laws of the State of New Jersey contrary to the provisions of U. S. C. A. 28, Sec. 41, Subdiv. 1, and that the respondent failed to exhaust her remedies in the administrative bodies and the courts of the State of New Jersey, and that the members of the Somerset County Board of Taxation were necessary and indispensible parties to the action (p. 71a to p. 73a).

On July 30, 1942, the Trial Judge filed his opinion denying the motion to dismiss on the ground that the Court did have jurisdiction within the Federal Declaratory Judgment Act, that the members of the Tax Board were not necessary parties, that the proceeding was not one to enjoin, suspend or restrain the collection of a tax and that the respondent did not have an adequate remedy in the administrative bodies and the courts of the State of New Jersey would not give adequate relief to redress intentional discrimination (p. 75a to p. 80a).

On August 10, 1942, an order was entered denying the petitioners' motion to dismiss (p. 80a to p. 81a).

On March 27, 1944, the respondent filed a motion for summary judgment against the petitioners based on an affidavit of Shelton Pitney, Esq., and by reference therein to depositions taken by the respondent from various witnesses which had been filed with the Clerk of the Court but which had not at any time been offered as evidence (p. 82a to p. 108a).

A motion at the same time was made to dismiss the complaint by the petitioners on the ground that the Court did not have jurisdiction, and that the Court in its discretion should not entertain jurisdiction on the ground that the respondent had a plain, adequate and complete remedy in the administrative bodies and the courts of the State of New Jersey, and as to the defendant Davis that he was not a necessary party (p. 109a to p. 110a).

On July 14, 1944, the Trial Judge filed his opinion granting the motion as to the defendant Davis and denied the petitioners' motion to dismiss the complaint and entered summary judgment in favor of the respondent and against the petitioners. The Court held the taxes to be invalid and based his decision on the affidavit of Shelton Pitney, Esq., and the decision of the New Jersey courts in *Duke Power Company* v. *State Board of Tax Appeals*, 129 N. J. L. 449, 30 Atl. (2d) 416, affirmed 131 N. J. L. 275, 36 Atl. (2d) 201.

The Court below held that the respondent had not had proper notice, or a hearing on the assessments, and that the assessments were made at a time when the Tax Board did not have jurisdiction.

The Court recognized the fact that there was an adequate state administrative and legal remedy because his decision was based on a ruling of the New Jersey courts which gave complete and adequate relief to the taxpayer, but held that the Court would still retain jurisdiction and decide the case on state law because the Court had originally taken jurisdiction on the ground of discrimination (p. 112a to p. 113a).

On August 7, 1944, the Court entered its summary judgment in favor of the respondent and against the petitioners (p. 115a to p. 116a). Upon appeal, the Circuit Court of Appeals for the 3rd Circuit affirmed this judgment.

Questions Presented

1. Did the Trial Court err in assuming and retaining jurisdiction of the respondent's complaint and the alleged cause of action set forth therein under the Declaratory Judgment Act on the alleged ground that under the laws of the State of New Jersey the respondent was without an adequate remedy in the state administrative bodies and courts for alleged intentional and systematic discrimination in the imposition of taxes, and that the state law was, therefore, in conflict with the Federal Constitution?

2. Did the District Court have jurisdiction of the respondent's complaint and the alleged cause of action set forth therein in view of the Johnson Act, 28 U. S. C. A., Sec. 41(1)?

3. Did the District Court err in granting a summary judgment in favor of the respondent and against the petitioners based on the state law?

POINT I

The Trial Court erred in assuming and retaining jurisdiction of the respondent's complaint and alleged cause of action set forth therein under the Declaratory Judgment Act.

The respondent sought by declaratory judgment to nullify two tax assessments for personal intangible property levied against her individually and two tax assessments levied against her as Trustee of the Duke Endowment, a common law trust created and existing by virtue of the laws of the State of New Jersey, also for personal intangible property. The District Court assumed and retained jurisdiction of the plaintiff's complaint and entered a summary judgment against the petitioners and in favor of the respondent on what it conceived to be the state law. The District Court retained jurisdiction of the complaint and alleged cause of action solely on the ground that the administrative bodies and the courts of the State of New Jersey failed to afford a full, complete and adequate remedy to redress intentional and systematic discrimination as alleged in the complaint.

It is the contention of the petitioners that the District Court erred in assuming and retaining jurisdiction of the plaintiff's complaint and should have either dismissed the complaint or retained jurisdiction of the complaint and compelled the respondent to exhaust her remedies first in the state administrative bodies and courts, and that in fact the New Jersey Court of Errors and Appeals, the Court of last resort in New Jersey, has accepted the legal principle laid down by this Court on the question of discrimination in *Sioux City Bridge Co.* v. *Dakota County*, 260 U. S. 441, 67 L. Ed. 340, 43 S. Ct. 190. This rule was recognized and applied in *Central R. Company* v. *Martin, State Tax Commissioner*, 112 N. J. L. 5, 169 Atl. Rep. 489, certiorari

denied 293 U. S. 568, 79 L. Ed. 667, 55 Sup. Ct. 79. That case is the last word on this issue by the Court of Errors and Appeals of New Jersey, and it is the view of the petitioners that under *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64, it is binding on the federal courts.

If the judgment of the District Court as affirmed by the Circuit Court of Appeals stands, then any New Jersey taxpayer who claims intentional and systematic discrimination in reference to any tax, whether it be for personal, intangibles or real property, can by filing a declaratory judgment suit in the federal court directly or indirectly enjoin the collection of the taxes assessed and without affording the state administrative bodies and courts an opportunity to correct such discrimination, if in fact it exists. That this is a serious and harmful interference with the fiscal operations of a state government and its subdivisions is apparent, and such an interference this Court has held should not be countenanced where the asserted federal right may be preserved without it.

It has been definitely settled by this Court, in *Great Lakes Dredge and Dock Company* v. *Huffman*, 319 U. S. 293, 63 S. Ct. 1070, 87 L. Ed. 1407, that the federal courts will not entertain a declaratory judgment suit instituted for the purpose of having the federal courts determine the invalidity of tax assessments, where the asserted federal right may be preserved without it and this is so whether or not it is apparent to the Court that the tax is invalid. This Court held that the considerations which have led federal courts of equity to refuse to enjoin the collection of state taxes, save in exceptional cases, applied to the use of the declaratory judgment procedure. An examination of that case will disclose that under the law set forth therein the Trial Court in the case at bar should not have assumed jurisdiction of the respondent's suit, but should have dismissed it, or compelled the respondent to exhaust her remedies in the state tribunals.

In that case an action was instituted in the United States District Court for the Eastern District of Louisiana praying that the Court declare that a state law of Louisiana as applied to the plaintiffs and their employees was unconstitutional and void. The issue raised in that case was the applicability of the Louisiana State Unemployment Compensation Law to maritime employees.

The validity of the tax was upheld in the District Court and in the Circuit Court of Appeals and at no time did either of those courts or the parties themselves raise the question of jurisdiction.

On granting a writ of certiorari this Court requested counsel "to discuss in their briefs and on oral argument the question of whether the declaratory judgment procedure can be appropriately used in this case where the complaint seeks a judgment against a state officer to prevent enforcement of a state statute."

There was not any allegation in the complaint in that case for any order to enjoin or restrain the taxing authorities but prayed for declaratory judgment as to the validity of the tax.

This Court held that the Trial Court in its discretion should not have entertained jurisdiction of a declaratory judgment suit to determine the validity or invalidity of a state tax and affirmed the dismissal of the Court below solely on the ground "that, in the appropriate exercise of the Court's discretion, relief by way of a declaratory judgment should have been denied without consideration of the merits."

In its opinion this Court said:

> "The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied

> in every case where the asserted federal right may be preserved without it. * * *"
>
> "For we are of the opinion that those considerations which have led federal courts of equity to refuse to enjoin the collection of state taxes, save in exceptional cases, require a like restraint in the use of the declaratory judgment procedure."

Applying that law to the facts in the case at bar as they appear from the record, it is clear that the Court below erred in assuming and retaining jurisdiction of the respondent's declaratory judgment suit and in entering summary judgment.

As appears from the complaint filed in this action relief was sought solely under the Federal Declaratory Judgment Act and the prayer of the complaint is that the assessments be declared wholly invalid and void (p. 35a).

The taxes assessed against the respondent individually and as trustee of the Duke Endowment were levied by the Somerset County Board of Taxation. The tax assessed on intangible personal property is a state tax created by the statutes of the State of New Jersey. *Jersey City* v. *Martin*, 126 N. J. L. 353, 19 Atl. (2d) 40, N. J. Rev. St. 1937, 54:4-1.

There is no distinction between the object sought in the case at bar and in *Great Lakes Dredge and Dock Co.* v. *Huffman, supra.* In both instances declaratory judgments were sought as to the validity or invalidity of a state tax and for that reason that case is applicable here. As stated by this Court in that case:

> "Interference with state internal economy and administration is inseparable from assaults in the federal courts on the validity of state taxation, and necessarily attends injunctions, interlocutory or final, restraining collection of state taxes. These are the considerations of moment which have persuaded federal courts of equity to deny relief to the taxpayer—especially where the state, acting within its

> constitutional authority, has set up its own adequate procedure for securing to the taxpayer the recovery of an illegally exacted tax. * * *"

There cannot be any question in the case at bar that the respondent had a plain, speedy and efficient remedy in the courts of the State of New Jersey if the taxes were illegally imposed. The Court below entered summary judgment against the petitioners on what it conceived to be the state law based on the decision of the New Jersey Supreme Court as affirmed by the Court of Errors and Appeals, in *Duke Power Company* v. *State Board of Tax Appeals*, 129 N. J. L. 449, 30 Atl. (2d) 416, affirmed 131 N. J. L. 275, 36 Atl. (2d) 201. The Trial Judge took the position that the law of that case was applicable to the facts in the case at bar and entered summary judgment for that reason and gave the relief which he believed would have been given the respondent in the state court.

The District Court found that the assessments were entered in each case after April 1st of the taxable year and, therefore, could be added only by a hearing after due notice and judgment, that this was not done, and therefore, the assessments were null and void. The District Court ignored the remedial statutes of the State of New Jersey and the Circuit Court of Appeals held the remedial statutes did not apply. The petitioners urge that this ruling is erroneous and that question is argued under Point III of the brief.

The Trial Court conceded that there was an adequate state administrative and legal remedy, but retained jurisdiction notwithstanding this on the ground that there was no point in sending the issue to the state court when the federal court could and did retain jurisdiction on the ground of discrimination. This is erroneous because it is based on the assumption that the Court had jurisdiction in the first instance and should retain it. It is not necessary at this

point to determine whether or not the Trial Judge's conclusions that *Duke Power Company* v. *State Board of Tax Appeals, supra,* is applicable and dispositive of the issues in the case at bar, for under *Great Lakes Dredge & Dock Co.* v. *Huffman, supra,* the correctness of the Trial Court's decision is immaterial if it lacked jurisdiction.

The petitioners contend that the Trial Judge erred in concluding that the *Duke Power* case was conclusive of the issues here, but assert the respondent at all times had a plain, speedy and efficient remedy in the administrative bodies and in the courts of the State of New Jersey. It is not contended by the respondent that if she could establish as alleged in the complaint that she was a non-resident at the time the tax was imposed, or did not own the property taxed, or that they were fraudulently imposed, or that the Tax Board did not have jurisdiction at the time it imposed the taxes, that she would not have any remedy in the courts of the State of New Jersey. Her claim has been, and the sole one on which the Trial Court claimed jurisdiction, that the courts of the State of New Jersey fail to provide an adequate remedy for a taxpayer against whom a tax has been assessed as the result of intentional discrimination.

The respondent had a right to appeal the assessments levied to the State Board of Tax Appeals where she would have had a trial *de novo* (Rev. St. 1937, 54:2-35). *City of Paterson* v. *Baker,* 139 Atl. Rep. 604; *Duke Power Company* v. *State Board of Tax Appeals, supra.* If not satisfied with the review before the State Board of Tax Appeals she could have applied to the New Jersey Supreme Court for a writ of certiorari to review the amount of the tax, the jurisdiction of the County Board, the validity or invalidity of the assessment, and all of the alleged legal impediments to the tax set forth in the respondent's complaint. *Pope* v. *Borough of Red Bank,* 19 Atl. (2d) 208; *Oradell* v. *State Board of Tax Appeals,* 125 N. J. L. 37, 13 Atl. Rep. (2d) 479; Rev. Stat. 54:4-59.

If the respondent had followed her administrative remedy in the State courts as was done in the *Duke Power Company* v. *State Board of Tax Appeals, supra,* she could have set up there all of the claims set up in her declaratory judgment suit. In that action Duke Power Company contended, as one of its grounds of appeal, that it had been intentionally discriminated against in having the taxes levied against it. See opinon of *State Tax Board,* 26 Atl. Rep. (2d) 713, wherein it is stated:

> "The petition of appeal before this Board charges that the assessments in question are contrary to our taxing laws, discriminatory, and in violation of the federal constitution. No attempt was made to prove the charge of discrimination and we therefore do not consider it . . . ."

The New Jersey Supreme Court on certiorari has the power to review and determine questions of fact as well as those of law. *Pennsylvania R. Co.* v. *State Board of Taxes and Assessments,* 103 N. J. L. 28; 134 Atl. Rep. 722; *Town of Kearney* v. *State Board of Taxes and Assessments,* 103 N. J. L. 26, 135 Atl. Rep. 61; *Colonial Life Insurance Company* v. *State Board of Tax Appeals,* 126 N. J. L. 126, 18 Atl. Rep. (2d) 625.

If the respondent was dissatisfied with the findings of the New Jersey Supreme Court she could then appeal to the Court of Errors and Appeals. *General Motors Corp.* v. *State Board of Tax Appeals,* 125 N. J. L. 574, 16 Atl. (2d) 632.

If the respondent were still dissatisfied and believed that she was deprived of any constitutional right, she had a right to apply to this Court for a review of the State Court's adjudication.

In this case the respondent has not made any payment of the tax assessed, but if she had and the tax was held invalid or excessive, she could recover any such payment

made in the event that it was not voluntarily returned by the taxing authorities. *Hahne Realty Corp.* v. *City of Newark*, 119 N. J. L. 12, 194 Atl. Rep. 191; *Francis Realty Co.* v. *City of Newark*, 16 N. J. Misc. Rep. 328, 199 Atl. Rep. 912.

Where a taxpayer has appealed to the State Board of Tax Appeals from the assessment against him and has paid to the collector of taxes such portion of the tax as he would be required to pay were his appeal sustained, the collector is excused from collecting the balance of the tax until the appeal is decided, and the Court of Chancery will enjoin the collection of any further amount until the appeal is decided. *Rice* v. *City of Newark*, 136 N. J. Eq. 53. The Supreme Court also has the power to stay the collection of the tax on the granting of a writ of certiorari. R. S. 1937, 54:5-10.

The Trial Court and the Circuit Court of Appeals fell into error in assuming that the courts of New Jersey would not permit a taxpayer to establish intentional discrimination in the assessment of a tax against him and to have an appropriate remedy.

In *Central R. Co.* v. *Martin, State Tax Commissioner*, 112 N. J. L. 5, 169 Atl. Rep. 489, certiorari denied 293 U. S. 568, 79 L. Ed. 667, 55 Sup. Ct. 79, the Court of Errors and Appeals of this State recognized the rule relating to intentional discrimination in the assessment of taxes as set forth by this Court in *Chicago C. W. Ry.* v. *Kendall*, 266 U. S. 94, and *Sioux City Bridge Co.* v. *Dakota Co.*, 260 U. S. 441.

In that case plaintiff sought a review of main-stem, tangible personal property and franchise tax for the year 1931. At that time the rate of taxation of main-stem, tangible personal property and franchise taxes were determined by dividing the aggregate taxes by the aggregate value of the general property in the state and the rate so arrived at constituted the average rate of taxation for the

year and was the rate to be applied to the railroad company. It was contended by the railroad that local assessors assessed local property at less than its true value and that the method employed by the local assessors throughout the state to bring about this result was to assess all property other than that of the appellant at not more than 60% of its true value. It claimed that its property was assessed at 100% of its true value and, therefore, sought to have its tax reduced to a 60% basis.

The railroad contended that the method of taxation employed deprived it of its property without due process of law in violation of the 14th Amendment of the Constitution and that the tax unlawfully discriminated against it.

In an effort to establish intentional and systematic discrimination, the railroad offered proof, which was accepted by the State Tax Board, of assessments made in sections of 14 of the 21 counties of the state and attempted to follow the character of evidence presented in *Louisville & Nashville Railroad Company* v. *Green, et al.*, 244 U. S. 522. The Court examined and considered all of the evidence produced by the railroad on which it based its claim of alleged intentional and systematic discrimination and found that the railroad had failed to establish intentional and systematic discrimination, and recognized the rule enunciated by this Court in *Sioux City Bridge Company* v. *Dakota County, supra.*

It appears from page 9 of the opinion in that case that the railroad did present evidence before the State Tax Board in an effort to establish that there was intentional discrimination on the part of the taxing authorities which violated the railroad's constitutional right. The State Tax Board found that the railroad had failed to establish that there was intentional discrimination on the part of the taxing authorities. A writ of certiorari was allowed by the New Jersey Supreme Court and in that Court the rail-

road was permitted to take depositions and presented additional evidence in an effort to establish intentional discrimination on the part of the taxing authorities. The New Jersey Supreme Court refused to review the appeal on jurisdictional grounds (109 N. J. L. 395). The Court of Errors and Appeals did review all of the evidence produced by the railroad before the Tax Board and before the Supreme Court on the question of discrimination and found that the proofs failed to establish the claim that the railroad's property was valued at a higher level than that of local assessable property generally, and that the proofs failed to establish that an organized effort was made by the local tax assessors to assess, systematically or intentionally, local property at less than its true value. That Court in its opinion, at page 14, said:

> "Appellant undertook to prove an organized and determined effort to undervalue property other than railroad property, systematically or intentionally. It must establish this undertaking as an adopted practice. *Chicago C. W. Ry.* v. *Kendall*, 266 U. S. 94; *Sioux City Bridge Co.* v. *Dakota Co.*, 260 *Id.* 441; *So. Ry. Co.* v. *Watts, Ibid*, 519. * * *"
>
> "Apellant failed to sustain the burden of proof that the 'average rate of taxation' was not computed by use of true values.
>
> As already pointed out we have fully considered the proofs submitted to the State Board of Tax Appeals as well as the proofs submitted on the rule to take depositions allowed in this cause."

At the time of this appeal there was not any state statute which authorized the railroads to specifically raise the question of illegal discrimination before the Tax Board or before the Supreme Court. There was in effect at that time Chapter 100 of the Laws of 1931, which, in Section 10, provided that the State Tax Board

> "is hereby empowered and charged with the duty to review, hear and determine all appeals by any per-

son, firm, or corporation, taxing district, municipality, or county, aggrieved by any act, proceeding, ruling, decision or determination of such appeals as will effectuate such final determination according to law."

The general language contained therein is not dissimilar from the language set forth in N. J. R. S. 54:2-35 which permits this respondent to appeal to the State Board of Tax Appeals in any action or determination of the County Board of Taxation.

It might be well to point out that when *Central Railroad Co.* v. *Martin, supra,* was pending in the Court of Errors and Appeals, the Legislature of New Jersey amended the Railroad Tax Act and provided specifically that if there was a claim of illegal discrimination in the assessment of property under that Act, a hearing could be had on such question before the State Board of Tax Appeals (Chap. 305, laws of 1933). This Statute became effective June 31, 1933, and was not considered in the decision in *Central Railroad* v. *Martin, supra.* That case was argued May 22, 1933, and decided December 7, 1933, and was to review taxes for the year 1931. The hearings in all of the administrative bodies and the Courts had been completed before the enactment of the Statute referred to and, therefore, did not have any relevancy nor was it considered by the Court in its opinion.

A reading of the opinion in *Central Railroad* v. *Martin, supra,* shows without question that the taxpayer did offer testimony both before the State Board of Tax Appeals and additional testimony in the Supreme Court after the granting of the writ of certiorari to prove alleged intentional discrimination on the part of the taxing authorities. The Court of Errors and Appeals considered this testimony and cited the law as laid down by this Court relating to intentional discrimination on the part of the taxing authorities in levying assessments, and found that the evidence produced did not establish intentional discriminaton.

It has been argued below by the respondent that this case was not applicable to the issues here because it did not involve a claim of discrimination within a single class of taxpayers. It is clear that the case was not argued or decided on the theory that all of the taxpayers within the class of railroads were taxed on the same basis, or that if there was discrimination in that property generally was taxed at a less value than railroad property, there was no violation of a constitutional right. On the contrary, that issue was not in the case and the Court considered the question of intentional discrimination in the same manner as if the complainant had been an individual and taxed under the general tax laws.

The Court in *Central R. R. Co.* v. *State Tax Department*, *supra*, stated at pages 7 and 8:

> "Notwithstanding the clear provisions of the law of arriving at the 'average rate of taxation' on its property in question, appellant asserted and sought to establish an organized and determined effort of local assessors to assess local property at less than its true value. The practice or the method employed by local assessors throughout the state to bring about this result, it is charged, was to assess all property other than that of the appellant at not more than sixty per cent of its true value. It is claimed that the property of the appellant was assessed at one hundred per cent of its true value. The result was that the average tax rate, so computed, amounted to $4.081 per $100 of value. It is further contended that if the average tax rate had been computed according to the true value of all property subject to local taxation throughout the state, as provided by law, the rate would not have been more than $2.093 per $100 of value.
>
> It therefore seems sound in logic and clear in reason that appellant must stand or fall on its ability to sustain by competent and satisfactory proof the basic or fundamental grievance asserted by it. For, if the foundation falls, all reasons based on that foundation must likewise fall.

> We therefore pass over all other questions and approach the inquiry, namely, did the appellant, by proper and satisfactory proof, sustain its basic or fundamental grievance? We think not."

The respondent contended in the courts below that the Supreme Court of New Jersey, the intermediate court of appeal, had in several cases refused to permit evidence of discrimination and that one of these cases, *Royal Manufacturing Co.* v. *Board of Equalization of Taxes*, 76 N. J. L. 402, 70 Alt. 978, was affirmed by the Court of Errors and Appeals in 78 N. J. L. 337, 74 Atl. 525, and that subsequent to *Central R. Co.* v. *Martin, State Tax Commissioner, supra*, a branch of the Supreme Court in *Lehigh Valley R. R. Co.* v. *Board of Tax Appeals*, 12 N. J. Misc. Rep. 673, 174 Atl. Rep. 359, held that the State Tax Board did not err in refusing to hear testimony of the taxpayer touching discrimination, and for that reason the respondent's remedy on the question of intentional and systematic discrimination in the courts of New Jersey was no remedy and uncertain, therefore, the Federal Court was justified in assuming and retaining jurisdiction.

Royal Manufacturing Co. v. *Board of Equalization of Taxes, supra*, was decided by the Court of Errors and Appeals in November, 1909, which was prior to *Sioux City Bridge Co.* v. *Dakota Co., supra*, which was decided in January, 1923.

In the *Royal Manufacturing Co.* case no reference is made to any case in this Court holding that the taxpayer's constitutional right has been violated when administrative bodies and state courts fail to provide an adequate remedy for intentional and systematic discrimination. None of the other cases cited by the respondent were ever passed on by the New Jersey Court of Errors and Appeals, and the question of intentional and systematic discrimination did not come before it again as far as we have been able to determine from the cases until *Central R. Co.* v. *Martin*,

State Tax Commisisoner, supra, decided in 1933, and there are not any cases subsequent to that time by that court to give the slightest indication that the New Jersey Court of Errors and Appeals will not follow that case if the issue is again presented to it.

The Trial Judge in his opinion on the first motion by the petitioners to dismiss, in discussing this case, assumes that if the Court had found that there was intentional discrimination that notwithstanding this it would not have granted any relief to the taxpayer, and that it appeared it was not the intent of the Court of Errors and Appeals to grant any relief to the taxpayer because subsequently a branch of the Supreme Court in *Lehigh Valley R. R. Co.* v. *State Board of Tax Appeals,* 12 N. J. Misc. Rep. 673, 174 Atl. Rep. 359, held that the State Tax Board did not err in refusing to hear testimony of the taxpayer touching discrimination.

At the outset it must be kept in mind that discrimination alone does not violate any constitutional right of the taxpayer. It must be an intentional or systematic discrimination.

It does not appear from *Lehigh Valley R. R. Co.* v. *State Board of Tax Appeals, supra,* whether or not there was any offer to prove intentional discrimination. Be that as it may, the decision of the Court of Errors and Appeals in *Central R. Co.* v. *Martin, supra,* stands unreversed and is the law of the State of New Jersey, and, of course, it could not be reversed by the subordinate New Jersey Supreme Court or any part thereof. Furthermore, under *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, the Trial Judge was duty bound to accept the state law as determined by the highest court of the state. This Court was satisfied with the manner in which the constitutional rights of the taxpayer were protected in that case as it refused to review the proceedings. Whatever may have been the law in New Jersey

prior to *Central R. Co.* v. *Martin, supra,* is of no force i in view of that decision which stands unreversed.

If we assume for the purpose of argument that th is uncertainty in the Courts of New Jersey as to the a quacy of the respondent's remedy for intentional and s tematic discrimination, then it would seem under the r laid down by this Court in *Spector Motors Service McLaughlin,* 323 U. S. 101, the District Court should have proceeded to adjudicate the issues, but should ha retained jurisdiction of the complaint pending the det mination of proceedings to be brought by the respond with reasonable promptitude in the state administrat bodies or state courts. In this manner the constitutio rights of the respondent would have been fully protect for if the administrative bodies and the state courts fused to grant adequate relief to the respondent if s proved intentional and systematic discrimination, then s could have had her remedy immediately by means of junction and an adjudication of the issues in the Fede Court.

The Circuit Court of Appeals for the Eighth Circ has recently applied the rule laid down in the *Great Lak* v. *Huffman, supra,* case in *Miller, et al.* v. *City of Gree ville, Miss., et al.,* 138 Fed. (2d) 712. In that action, t City of Greenville, a Mississippi corporation, and Uni Planters National Bank & Trust Co., a national bank Tennessee, as trustee under a trust indenture, brought declaratory judgment action against the Arkansas Corpo tion Commission and its individual members, and agai tax officials of Chicot County, Arkansas, for a declarato judgment and prayed that the Court declare that the p tion of a bridge over the Mississippi River which was the State of Arkansas and owned by the City of Greenvil was exempt from taxation by the Arkansas state autho ties. The United States District Court for the Eastern D trict of Arkansas granted the plaintiffs' prayer and

tered a declaratory judgment in its favor. The District Court's judgment was entered October 28, 1942, prior to the opinion of this Court in the *Great Lakes* case. The Circuit Court of Appeals for the Eighth Circuit dismissed the declaratory judgment action on the basis of the mandate laid down by this Court in the *Great Lakes* case.

It is well established that the federal courts exercise an appropriate reluctance to interfere with the fiscal affairs of a state and it is the accepted practice that the federal courts relinquish their jurisdiction in favor of the state courts in respect to such matters if the full rights of the plaintiff can be there preserved without impairment. *Boise Artesian Water Co.* v. *Boise City*, 213 U. S. 276; *Matthews* v. *Rogers*, 284 U. S. 521; *Pennsylvania* v. *Williams*, 294 U. S. 176.

And this is so even though a plaintiff charges a violation of rights guaranteed to him by the due process and equalization clauses of the 14th Amendment. It is accepted that the state courts bear equal responsibility with federal courts to guard and protect the rights secured by the Constitution of the United States. *U. S.* v. *Bank of New York*, 296 U. S. 463.

We, therefore, respectfully submit that the respondent's complaint should have been dismissed by the District Court, or, if the District Court retained jurisdiction of the complaint, the respondent should have been compelled to proceed with the determination of her claim in the administrative bodies and state courts.

POINT II

The Court did not have jurisdiction of the respondent's complaint and the alleged cause of action set forth therein.

While it is true that in the case at bar no prayer for injunction was made, the effect of the Court assuming jurisdiction and entering summary judgment in favor of the respondent and against the petitioners is to grant complete immunity from taxation to respondent for the two years involved in this suit. It is, therefore, just as effective as if these petitioners had been enjoined and restrained from proceeding with the assessment and collection of the tax.

If the respondent had, as petitioners contend, a plain, speedy and efficient remedy in the state courts, such action is prohibited by virtue of 28 U. S. C. A., Sec. 41 (1), which provides:

> "Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any state where a plain, speedy, and efficient remedy may be had at law or in equity, in the courts of said state." (Enacted August 21, 1937.)

The respondent's action herein is an attempt to do indirectly what is prohibited by the Judicial Code. This question was discussed but not decided by this Court in *Great Lakes Dredge & Dock Company* v. *Huffman, supra,* when it said:

> "It is true that the Act of Congress speaks only of suits 'to enjoin, suspend or restrain the assessment, levy, or collection of any tax' imposed by a state law, and that the declaratory judgment procedure may be,

> and in this case was, used only to procure a determination of the rights of the parties, without an injunction or other coercive relief. It is also true that that procedure may in every practical sense operate to suspend collection of the state taxes until the litigation is ended. But we find it unnecessary to inquire whether the words of the statute may be so construed as to prohibit a declaration by federal courts concerning the invalidity of a state tax. For we are of the opinion that those considerations which have led federal courts of equity to refuse to enjoin the collection of state taxes, save in exceptional cases, require a like restraint in the use of the declaratory judgment procedure. */* *"

In *Spector Motor Service* v. *McLaughlin, supra,* this Court held the Johnson Act did not prevent the District Court from assuming jurisdiction and to give whatever relief was appropriate because of the uncertainty surrounding the adequacy of the Connecticut remedy involved in that case under circumstances which do not exist in the case at bar.

Several courts that have considered this question have held that such procedure is barred by the section of the Judicial Code quoted. *Collier Advertising Service, Inc.* v. *City of New York, et al.,* 32 Fed. Sup. 870 (S. D.).

In *West Publishing Co.* v. *McColgan,* 138 Fed. (2d) 320 (9th C. C. A.), a declaratory judgment suit was filed against the tax commissioner of the State of California praying that the Court declare that an assessment of income taxes against the plaintiff under the California statute be held invalid and also praying for an injunction. The prayer for injunction was abandoned. The District Court dismissed the complaint and this was affirmed by the Circuit Court of Appeals. The Court held that if a declaratory judgment were entered in favor of the plaintiff even though the prayer for injunction were denied, the effect of such a judgment would amount to a suspension of the assessment and re-

strain and enjoin the collection of the tax. The Circuit Court in its opinion said at page 325:

> "The first question is answered by the prayer of the complaint; if the relief demanded were granted, the judgment unquestionably would 'enjoin, suspend or restrain' the assessment and collection of the tax. If the State could not collect the tax because of a judgment, no one would have the temerity to deny that it was very effectively enjoined and restrained. See *Collier Advertising Service* v. *City of New York*, supra; *Helms Bakeries* v. *State Board of Equalization*, 53 Cal. App. 2d 417, 128 P. 2d 167, 170. Although the appellant apparently has abandoned its prayer for injunction, what we have said applies with equal force to either remedy sought. It is, in the circumstances, wholly unnecessary to discuss 'irreparable injury.'"

See Borchard on Declaratory Judgment, Second Edition, page 828, wherein commenting on the *Collier* case he says:

> "Yet District Judge Clancy was probably correct in refusing under the Johnson Act to take jurisdiction of a federal suit for a declaratory judgment to hold invalid the 2% New York City sales tax as applied to a purchase of 12 cents or less. * * * In so holding, the court was apparently correct, for the Johnson Act was designed to prevent federal assumption of jurisdiction to adjudicate and not merely the issuance of an injunction."

The adequacy of the remedy of the respondent in the state courts was fully discussed under Point I and will not be reiterated here.

We respectfully urge that the effect of the assumption of jurisdiction of the declaratory judgment action in this case was just as effective as if the Court in the first instance had enjoined the collector of taxes of the Township of Hillsborough from collecting the tax, and that such action is prohibited by the section of the Judicial Code cited.

POINT III

The Court erred in entering summary judgment in favor of the respondent and against the petitioners.

The Court denied the right of the petitioners to a hearing on the merits and entered summary judgment based on the affidavit of the attorney for the respondent, Shelton Pitney, Esq., and the state case law. The Court based its judgment on the ground that the taxes were assessed by resolutions without notice to the respondent and without a hearing and were, therefore, null and void under *Duke Power* v. *State Board of Tax Appeals*, *supra* (p. 112a to p. 113a).

As we have pointed out under Points I and II, it is evident that the Court assumed jurisdiction on the basis of alleged intentional discrimination and that issue has never been determined, nor have the petitioners had an opportunity to meet it. The relief the Court gave was based on a remedy available to the respondent in the state court and not one requiring the intervention of the federal court.

It is apparent that the Court was in error in finding that the respondent was entitled to judgment as a matter of law on the ex-parte record before the Court.

The affidavit filed by counsel for the respondent is in great part hearsay and in the nature of a brief and not one that would be admitted in evidence. It attempts to incorporate by reference therein certain depositions taken of members of the Tax Board who are not now, and were not at the time the depositions were taken and the summary judgment entered, parties to the action. Affidavits to be used on summary judgment shall be made on personal knowledge and shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

Federal Rules of Civil Procedure, 56, sec. 1. *Person* v. *U. S.*, 112 Fed. Rep. (2d) 1, certiorari denied 311 U. S. 672.

None of the depositions referred to in the affidavit of counsel for the respondent had been offered in evidence, nor does it appear that there are any facts which would make them evidential under Federal Rules of Civil Procedure 26d.

For this reason we submit that the Trial Judge erred in considering the affidavit of counsel on the summary judgment proceeding.

There are a great many distinctions between the case at bar and *Duke Power Company* v. *State Board of Tax Appeals, supra,* on which the Trial Judge based his decision.

In the case at bar there are separate assessments levied for the years 1940 and 1941 against the respondent, Doris Duke Cromwell, individually, and as Trustee of the Duke Endowment. The Duke Endowment is a common law trust created by James B. Duke on December 11, 1924, when a resident of Hillsborough Township, New Jersey (pp. 25a to 28a). The creator of the trust, James B. Duke, died a resident of Hillsborough Township and his Will was probated and his estate administered in Somerset County, New Jersey, wherein Hillsborough Township is located. In his Will he provided additions to the aforesaid Duke Endowment and provided for its distribution to the respondent individually in the event that said trust should be held invalid, or any part thereof held invalid (pp. 57a to 59a). It is alleged in the complaint that the Duke Endowment is a charitable trust devoted exclusively to charitable purposes. This is denied in the answer and is denied that any income or corpus of the endowment is devoted to religious, charitable, benevolent or eleomosynary purposes in New Jersey and is, therefore, unexempt from taxation in the State of New Jersey.

The situs of a common law trust is the domicile of the creator at the time it is created. *Swetland* v. *Swetland*, 105 N. J. Eq. 608, 149 Atl. Rep. 50; affirmed 107 N. J. Eq. 504, 153 Atl. Rep. 907. The creation and existence of this trust is by virtue of the laws of the State of New Jersey and it receives protection and benefits by virtue of the laws of the State of New Jersey, and is a subject over which the sovereign power of the State extends and may subject to taxation. *State Tax Commission of Utah* v. *Aldrich*, 316 U. S. 174, 86 L. Ed. 1358, 62 Sup. Ct. 1008.

In the *Duke Power* case the Court found as a fact that the property was not assessable in Hillsborough Township because the identical property had been assessed and taxes paid thereon in the State of North Carolina and, therefore, the property was exempt from taxation in the State of New Jersey. R. S. 1937, 54:4-3.2.

In the case at bar no claim is made that the respondent individually or as trustee of the Duke Endowment has ever paid any tax in New Jersey or elsewhere on the property for which the assessments were levied.

Under the New Jersey Statutes there are two methods of including property omitted from the tax list. R. S. 1937, 54:3-20 provides a method for the inclusion of property omitted by the assessor and another method for the inclusion of property omitted from the assessment. When property has been omitted from assessment by the local assessor, the County Tax Board shall by resolution cause to be entered upon the tax duplicate a proper assessment and immediately give notice of such entry and of the time and place of its next meeting to the owner of the property affected. The other method is that on the written complaint of the collector or any taxpayer of the taxing district specifying property that has been omitted in the assessment, the County Tax Board on five days' notice in writing to the owner by the party complainant and after due examination and

hearing may enter the omitted property by judgment rendered within ten days after the hearing.

In the *Duke Power* case the tax was assessed for the year 1939 and the proceeding was originally instituted under the second section of the statute by giving five days' notice in writing that a hearing was to be held. On November 13, 1940, a hearing was held and on November 18, 1940, the assessment was levied on certain cash. On November 22, 1940, the County Tax Board without any notice to the Duke Power Company entered an additional assessment against it for intangible personal property omitted from the assessment of November 18th. At the next meeting of the Tax Board the attorneys for the Duke Power Company appeared before the Board and were refused a hearing. In the *Duke Power* case the Court pointed out that it was not necessary to consider the application of the remedial statutes, R. S. 1937, 54:4-58 to 54:4-60, as none of the property was liable to taxation in the Township because a tax had already been paid on the property in North Carolina and it was, therefore, exempt under the New Jersey statutes.

In the resolutions levying the assessments in the case at bar notice was given to the respondent that the next regular meeting of the Somerset County Board of Taxation would be held on July 14, 1941, at 10:30 A. M. at the Somerset County Court House, Somerville, New Jersey. It is not contended by the respondent that she, or anyone on her behalf, attended the hearing and was refused a hearing, or requested a hearing, and in fact the only presence of any one representing the respondent at that hearing was the United States Marshal and one of the respondent's attorneys, who accompanied the United States Marshal while serving the summons in the present declaratory judgment action on the members of the County Tax Board.

In the case at bar no claim for exemption was filed by the plaintiff on any of the property assessed, nor was any action taken by the respondent for a hearing or review of the assessments in the state administrative boards or Courts. The Trial Court and the Circuit Court of Appeals gave no consideration to the remedial statute which provides:

> "54:4-58. No tax, assessment or water rate imposed or levied in this state shall be set aside or reversed in any action, suit or proceeding for any irregularity or defect in form, or illegality in assessing, laying or levying any such tax, assessment or water rate, or in the proceeding for its collection if the person against whom or the property upon which it is assessed or laid is, in fact, liable to taxation, assessment or imposition of the water rate, in respect to the purposes for which the tax, assessment or rate is levied, assessed or laid."
>
> "54:4-59. The Court in which any action, suit or proceeding is or shall be pending to review any such tax, assessment or water rate shall amend all irregularities, errors or defects, and may if necessary ascertain and determine the sum for which the person or property was legally liable and by order or decree fix the amount thereof. The sum so fixed shall be the amount of tax, assessment or water rate for which the person or property shall be liable."

The Circuit Court of Appeals held that the foregoing statutes were not applicable to these assessments. An examination of the cases construing these statutes shows clearly that they were intended to cure or remedy any irregularity or defect in assessing, laying or levying any tax. In taking this view that Court fell into error. In *Duke Power Co.* v. *State Board of Tax Appeals, supra,* the Court held it was not necessary to consider the remedial statutes because none of the property was taxable in the township where taxed. The Court by way of dicta in that

case stated that the application of the remedial statutes has been only in instances where property has been omitted by the assessor or has been assessed in the name of one other than the true owner. That this was at its best judicial dicta and an erroneous statement of the law under the cases in New Jersey, we shall point out later in the brief. However, taking the view accepted by the Circuit Court of Appeals, its judgment is erroneous because it failed to distinguish between the petitioner, Doris Duke Cromwell, as an individual and as a Trustee of the Duke Endowment. If the application of this statute was to be applied only where the property has been omitted by the assessor and not when the property has been omitted from the assessment, then the remedial statutes apply to the Duke Endowment. The assessment against the Duke Endowment made in this case was an original one as it had never been assessed before by any assessor. The omission of property from the assessment presupposes some existing assessment from which property has been omitted. This is not so as far as the Duke Endowment is concerned as at the time the assessment in the case at bar was levied there were no existing assessments, as it had never been assessed before that time.

The Courts of New Jersey have been consistent in according a broad interpretation to these statutes so that no property legally taxable in the State should escape taxation through any mistake or illegality of any kind by the taxing officials. These statutes were originally passed as Chapter 157, Laws of 1881.

In an early construction of the statute in *Conover* v. *Honce*, 46 N. J. L. 347, Chief Justice BEASLEY, speaking for the Court of Errors and Appeals, said:

> "As I read that act, its effect is to destroy, root and branch, the power to defeat such a proceeding except upon a meritorious ground. If the person or the property be not taxable, the processes of appeal

and certiorari retain their usual efficacy, but, touching forms and irregularities of procedure, they have been stripped of all force whatever. In fact, the statute, in very terms, declares that such shall be its effect."

In *Saunders* v. *Morris*, 48 N. J. L. 99 (Sup. Ct. 1886), 2 Atl. Rep. 666, an assessment had been made under a statute repealed by the constitutional amendment of 1875 requiring the taxation of property by general laws. Although the assessment was made under a void statute, the nature of the illegality there was held not to warrant the invalidation of the assessment because of this curative statute. The Court in that case said:

"Under such circumstances, the general act respecting taxes, assessments, and water rents, approved March 23, 1881 (Pamp. L. 1881, p. 194) prohibits the court from annulling taxes merely because of illegality in the assessment of the same, and makes it our duty to see that the complaining taxpayer bears his fair share of the common burden."

In *Muscanetcong Iron Works* v. *Netcong*, 90 N. J. L. 58, 99 Atl. Rep. 914, an assessment of omitted property was made by the tax collector without giving the taxpayer notice of the next meeting of the county board as required by the statute. The Supreme Court in affirming the assessment levied against the taxpayer without the notice prescribed by the statute said:

"Under section 39 of the Tax Act we are forbidden to set aside the tax for irregularity or defect in form or illegality in assessing, laying, or levying the tax, if in fact the prosecutor is liable to taxation in respect of the purpose for which the tax is levied. Such is the present case."

In *Manistee Iron Works Co.* v. *Raritan Township*, 12 N. J. Misc. 143 (Sup. Ct. 1934), 170 Atl. Rep. 39, the cura-

tive statute was applied where a local assessor assessed taxes against a corporation for the years 1926 to 1931. Discovering that the property belonged to the Manistee Iron Works and not the corporation assessed he then made penciled changes upon his records, transferring the assessments to the Iron Works. The tax remained unpaid and the property was sold for taxes and a review of the proceedings was sought. The assessment was affirmed under the curative provisions of this statute. The Court held that this legislation was not confiscatory as the owner of the property knows that it is subject to taxation and he is under a duty to make reasonable inquiry as to its taxes. On the question of the loss of the taxpayer's appeal to the County Tax Board the Court said:

> "Although the prosecutor could not appeal to the county board or other agency designed for the correction of errors, and, in fact, had no previous notice of the action taken, does not unjustly affect the prosecutor, since a review in the court affords a full and effective remedy within the purview of the organic law. The law does not require that the prosecutor shall have a right to review by the state tax board. It is sufficient that he be not deprived of his property without due process of law."

In *Ridgewood Elks Holding Corporation* v. *Village of Ridgewood*, 127 N. J. L. 295 (E. & A. 1941), 22 Atl. (2d) 266, the taxing district had entered as exempt on its tax list for 1937 and 1938 a large building owned by the taxpayer and five acres of a fourteen acre tract on which the building stood. The remaining nine acres were entered as taxable and tax bills were submitted for this and paid by the owner. Some time thereafter the tax assessor on his own volition and without any notice of the action to the taxpayer changed the tax duplicates and cancelled the exemptions originally noted and entered all of the property as taxable. Demand for the additional taxes due for the years 1938 and 1939 was not made until August, 1940, and the property was sold for

non-payment of such taxes on October 1, 1940. The Court held that the curative statute was applicable and found that the property should have been subject to such taxation in the first instance and affirmed the judgment dismissing the taxpayer's appeal.

In the case cited no demand was made for the additional tax until August, 1940. This was beyond the time which the taxing district would have had under the statute to add this property to the tax list as omitted property. Under R. S. 1937, 54:3-20, the proceedings to add omitted property must be brought within one year from the date on which taxes become a lien on real property. This time for the 1938 taxes expired on December 1, 1939, and no proceedings had been taken to add this omitted property to the tax list in accordance with the statute. It was done solely by the tax assessor on his own volition and without notice The Court in that case said:

> "Our view then is that in an attack upon a proceeding for the collection of a tax, where the invalidity claimed is one in the assessment, the quoted statute applies, and we should not set aside a sale upon the ground that the assessment was irregularly made if the property is, in fact, liable to the tax which was sought to be imposed. If the certiorari were to review the assessment itself, under R. S. 54:4-59, the court would be under the duty to correct all irregularities and errors and determine the sum for which the property was legally liable and fix the amount thereof. In any event, we think we should not set aside the sale upon a holding that the assessment was irregularly made in the face of the statutory direction that assessments shall not be voided when the property is liable for the tax levied."

It is contended by the respondent that the Remedial Statutes, 1937, 54:4-58 to 54:4-60 do not apply where the statute for the addition of omitted property is not complied with because of a statement made to that effect by the New

Jersey Supreme Court in *Duke Power Co.* v. *State Board of Tax Appeals*, 129 N. J. L. 449, 30 Atl. 2d 416, affirmed 131 N. J. L. 275, 36 Atl. 2d 201. The reference to this statute, in the opinion in *Duke Power, supra*, is mere dictum, as the Court did not consider the statute in determining the issues raised.

The Court in the *Duke Power* case said:

> "Since none of the property in question was liable to taxation in Hillsborough Township we need not consider the application of the remedial statutes. N. J. S. A. 54:4-58, 54:4-60. * * *"

It is obvious from this statement that the Court did not consider the remedial statutes referred to in the adjudication which it made. Notwithstanding this, the Court went on to say that the remedial statutes were not a substitute for proper assessment and that their application has been only in instances where property has been omitted by the assessor or has been assessed in the name of one other than the true owner, and that the remedial statutes did not apply where the procedure for the addition of property omitted from the assessment is not complied with.

That this statement is dictum and also an erroneous statement of the law as appears from the adjudications where the remedial statutes have been construed and applied can be demonstrated.

In *Crescent Ring Co.* v. *Travelers Indemnity Company*, 102 N. J. L. 85, 132 Atl. Rep. 106, the Court of Errors and Appeals in defining dictum said at page 89:

> "Obiter dictum is an expression of opinion by the court or judge on a collateral question not directly involved, or mere argument or illustration originating with him, while judicial dictum is an expression of opinion on a question directly involved, argued by counsel and deliberately passed on by the court, though not necessary to a decision. While neither

> is binding as a decision, judicial dictum is entitled to much greater weight than the other and should not be lightly disregarded."

It will, therefore, be seen that at best the statement referred to is judicial dictum and not binding as a decision on the Federal Courts although entitled to greater weight than obiter dictum, and this is so whether the statement is a pronouncement of the New Jersey Supreme Court or the Court of Errors and Appeals.

It is the petitioners' contention that, therefore, the Trial Court in the case at bar should have considered the remedial statutes and should have made an independent examination of the cases in New Jersey construing the effect of the statutes.

The statute clearly states that no tax assessment imposed or levied shall be set aside for any irregularity or defect in form or illegality in assessment if the person or property is in fact liable for the tax. It further provides the same protection up to and including the proceedings for collection of the tax.

In *Dodge* v. *Love*, 47 N. J. L. 436, affirmed 49 N. J. L. 235, the Court pointed out that the purpose of the statute is to act within its scope until all of the steps necessary in levying and collecting the public revenues have been completed. In that case the Court said:

> "The act is remedial and should be liberally construed to embrace within its scope all the steps necessarily taken in levying the public revenues. That such was the legislative purpose is manifested by the fact that its operation is expressly extended to the proceedings for the collection as well as for the assessment of taxes. It could not have been intended to exclude the intermediate steps between the initial and final procedure."

In the *Ridgewood Elks* case, *supra*, the Court of Errors and Appeals did exactly what the dictum in the *Duke Power*

case said could not be done. It applied the remedial statutes to validate a tax illegally entered as property omitted in the assessment.

In the *Duke Power* case the Court stated that property omitted by the assessor must be added to the tax list before April 1st of the taxable year. That any property added to the tax list after April 1st of the taxable year must be in accordance with the second section of R. S. 54:3-20 and added as property omitted in the assessment. This section provides for a hearing by the county tax board after a complaint has been filed and on five days' notice of the hearing to the taxpayer, and also a judgment thereafter within ten days.

In the *Ridgewood Elks* case taxes were assessed for the years 1938 and 1939. A building and five acres of land owned by the taxpayer were not included because the assessor assumed they were exempt from taxation. These taxes were paid.

On March 21, 1939, the State Tax Board handed down a decision relating to the 1937 tax voiding similar exemptions for that year. The 1938 and 1939 taxes were not involved in that case.

The only way the building and land exempted could be added to the tax list for 1938 and 1939 was in accordance with R. S. 54:3-20.

On the 1938 tax the County Tax Board was required under the statute to hold a formal hearing with due notice and the entry of a judgment.

The local assessor took it upon himself to change his tax duplicates for 1938 and 1939 by adding to the assessment the value of the previous exempt building and five acres of land. The County Tax Board did not undertake to act in any respect.

Under the statute as construed in the *Duke Power* case the local assessor had no more right to add the additional assessment than would a complete stranger.

Notwithstanding these facts, the Court of Errors and Appeals upheld the illegal assessment of property omitted in the assessment by applying the remedial statutes and held that it would not set aside a tax where the invalidity claimed is one in the assessment.

It will, therefore, be seen that the tax collector without any authority added property omitted from the assessment. The Court of Errors and Appeals in the *Ridgewood Elks* case held that the remedial statutes were applicable even though the property added had been omitted from the original assessment. This is doing the very thing which the Circuit Court of Appeals held could not be done by way of the remedial statutes.

In the *Ridgewood Elks* case, *supra*, the tax was held to be valid under the curative statute, although there were no legal proceedings taken to add the property to the tax list. This certainly is a far broader construction of the curative statute than is necessary to sustain the assessment made in this case, assuming the irregularity contended for by the respondent exists, and particularly is this so in view of the allegation of the answer of petitioners that the respondent purposely concealed the nature and extent of assets and property taxable to her individually and as trustee of the Duke Endowment.

We, therefore, submit that if the courts below, in the case at bar, had considered the remedial statutes and had made an independent examination of the cases relating to the application of the remedial statutes, it would have been clear to those Courts, that they are applicable in the situation presented here and would have validated any illegality in the assessment.

CONCLUSION

For all the reasons set forth herein, we respectfully submit that the judgment of the Circuit Court of Appeals affirming the judgment of the District Court should be reversed and the complaint dismissed, or that the judgment be reversed and the respondent be required to proceed forthwith in the state administrative bodies or courts of New Jersey for the claims asserted in the complaint.

Respectfully submitted,

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